U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

Date: March 8, 2000
Case No.: **1999 INA 268**

In the Matter of:

CIRPAC SYSTEMS TRAVEL CO., Employer,

on behalf of

SYLVESTER W. IGNATIUS, Alien

Certifying Officer: Hon. R. M. Day, Region IX
Appearance: D. E. Korenberg, Esq., of Encino, California, for Employer and Alien.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that CIRPAC SYSTEMS TRAVEL CO., ("Employer") filed on behalf of SYLVESTER W. IGNATIUS ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California,, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

STATEMENT OF THE CASE

On May 18, 1995, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Travel Consultant Manager" in its Travel Agency. The position was classified as an "Manager, Travel Agency" under DOT Occupational Code No. 187.167-158.[3] Employer described the Job Duties as follows:

> Supervises and coordinates the activities of the personnel who make the travel arrangements for the clients. Suggests travel itineraries for customers such as destination, mode of transportation, travel dates, financial considerations, and accommodations required. Will handle any conflicts that may arise between the clients and personnel. Will advise clients regarding rates of monetary exchange and currency limitations. Review employee ticketing & scheduling information for accuracy, reconcile sales slips and cash. Will inform employees of changes in tariffs, scheduling, and regulations. Will also conduct interviews, hire/fire, and train new employees. Plan sales promotions and approve advertisements.

AF 94, box 13. (Copied verbatim without change or correction.). This was a forty hour a week job from 9:00 AM to 5:00 PM, with no provision for overtime work at a salary of $2,519.40 per month. *Id*., boxes 10 -12. The Employer's educational requirement was high school graduation, and it required three years of experience in the Job Offered. As Other Special Requirements the Employer said,

> Employer will consider applicants with out recent experience in job offered. Must Apollo System One & Pass Computer Airline Reservation System. Will be tested to verify ability

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[2]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[3]187.167-158 **MANAGER, TRAVEL AGENCY** (business ser.; retail trade) Manages travel agency: Directs, coordinates, and participates in merchandising travel agency services, such as sale of transportation company carrier tickets, packaged or specialized tours, or vacation packages. Plans work schedules for employees. Trains employees in advising customers on current traveling conditions, planning customer travel and itineraries, ticketing and booking functions, and in calculating costs for transportation and accommodations from current transportation schedules and tariff books and accommodation rate books. Sells travel tickets, packaged and specialized tours, and advises customers on travel plans. Reviews employee ticketing and sales activities to ensure cost calculations, booking and transportation scheduling are in accordance with current transportation carrier schedules, tariff rates, and regulations and that charges are made for accommodations. Reconciles sales slips and cash daily. Coordinates sales promotion activities, approves advertising copy, and travel display work. Keeps employee records and hires and discharges employees. *GOE: 11.11.04 STRENGTH: L GED: R4 M4 SVP: 7 DLU:77*

to use software."[4]

(Copied verbatim without change or correction.). *Id.* The Employer's recruitment report noted five applicants for this position, none of whom was hired for the Job Offered. AF 109-111, 130-153.[5]

Notice of Findings. On February 10, 1997, the Certifying Officer ("CO") issued a Notice of Findings ("NOF"), proposing to deny certification. AF 88-92. (1) The NOF cited 20 CFR § 656.20(c)(8) and required the Employer to file specified documentation to show that the job opportunity was clearly open to any qualified U. S. worker. (2) NOF cited 20 CFR § 656.21(b)(2)(i)(A) and noted that the proposal to test U. S. workers at the outset might exclude applicants who met the stated job requirements, observing that the file did not contain any evidence of the Alien's test, the identity of the person who administered the test to him, or the conditions under which it was administered. Employer was told to delete the unduly restrictive requirement of the skills test or to justify the job requirement based on business necessity. (3) The NOF cited 20 CFR §§ 656.21(b)(6) and 656.24(b)(2)(ii), and found that Ms. Hunt, a U. S. worker who met the major requirements for the job, was unlawfully rejected. The Employer alleged that it interviewed her by telephone and requested that she provide a brief demonstration on Apollo System I and PASS Computer System NOF, but that she stated that she had no knowledge of any airline computer system. This was inconsistent with Ms. Hunt's resume, which showed experience in the use of System I, which indicated capability in the use of Apollo system I or a similar system I. Consequently, this test requirement discouraged a U. S. worker who apparently was qualified under the stated Job Requirements, as she had more than the required amount of experience and her resume stated that she was "computer literate." By way of corrective action the Employer was directed to rebut with persuasive documentation that Ms.

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[4] The Employer added to the Application, "If the applicant is not able to show the usage of the programs, he will not be qualified for the offered job." AF 98. The Employer later added, "Applicant's abilities will be measured by whether or not he/she knows how to access the system and to operate the system by taking down a reservation, confirming a reservation or even just to look up a reservation for a customer." Employer indicated that its advertisement stated, "ER will consider applicants who may not have recent work experience as a Mngr, Trval Agency." AF 114. In addition, the Employer said that at the time he was hired, the Alien did demonstrate his ability to use Apollo System One and PASS computer Airline Reservation System. AF 100-101.

[5] A national of Sri Lanka, the Alien was born 1959 and graduated high school and completed an Associate in Arts degree in accounting in 1993. From January 1993 to the date of application he took university level courses in business administration. The Alien worked as Travel Manager in a travel agency in Sri Lanka, where he performed duties similar to the Job Offered from September 1982 to December 1985, and he worked as a bank teller in Los Angeles from October 1990 to June 1964. The record does not contain any documentation verifying the Alien's employment at a "Travel Manager" in Sri Lanka. From June 1994 to the date of application he said he was unemployed. At the time of the application the Alien was living in the United States under an F-1 visa. An F-1 visa is issued to a student, who has a residence abroad in a foreign country which he has no intention of abandoning, who is a *bona fide* student qualified to pursue a full course of study, and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established college, university, or other academic institution. See Act § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F).

Hunt was recruited in good faith and that she was rejected solely for lawful, job related reasons.

Rebuttal. On March 14, 1997, the Employer submitted a rebuttal that consisted of a letter from counsel, a statement by an officer of the Employer company, articles of incorporation and a list of its officers and directors, a letter from the president of another travel agent firm, the Employer's Apollo software license agreement and instructions for the use of the reservation system, Ms. Hunt's resume, and a copy of Employer's telephone bill. AF 38-87. The Chief Executive Officer and signer of the Application was Alfredo Herrera, whose statement said that the brother of the Alien, Loyola Ignatius, was corporate secretary and chief financial officer. Mr. Herrera did not disclose the relative size of the interest of Loyola Ignatius in the Employer corporation, although he volunteered that the Alien did not own any interest in the firm. He also said that he had administered the test on the use of the Apollo system. While he asserted that the Alien held a certificate showing that he was trained in the use of the software, the rebuttal did not contain evidence of such certification.

Final Determination. The CO issued a Final Determination denying certification on June 11, 1997. AF 31-37.

20 CFR § 656.21(b)(2)(i)(A). After reviewing the NOF and rebuttal, the CO said the Employer did not sustain its burden of proof. Addressing the unduly restrictive requirement under 20 CFR § 656.21(b)(2)(i)(A), the CO noted counsel's argument that it had amended the Application to allow applicants to demonstrate the ability to use any computer airline reservation system, and the rebuttal argument that asserted, "Thus, knowledge of any of the airline reservation systems is acceptable." The CO said

> In fact, the employer had not amended the application to allow testing on "any" computerized airline reservation system, nor did the NOF indicate that the CO had thought so. The employer's amendment, dated May 9, 1995, include a statement: "applicants will be asked to sit in front of the computer and give a short demonstration in the use of Apollo System One and Pass Computer Airline System."

(Copied verbatim without change or correction.). The CO explained that, "The employer's evidence submitted with the rebuttal ... does not address whether it is normal to test a worker, or require a 'short demonstration,' on the use of a particular software such as Apollo System One or the Pass Computer Airline System at the employment interview stage rather than allowing for a period of orientation for a worker who has used a different computerized reservation system." The CO then noted that the partner of the Alien's brother had administered the computer test to him, and said, "There was no indication that any other employee has taken such a test, nor is there any evidence of the test." The CO added that the Employer failed to establish the business necessity of its job requirement of a demonstration of an applicant's use of the Apollo System One and Pass Airline Reservation System.

20 CFR § 656.21(b)(6). Addressing the rejection of Ms. Hunt, the CO cited 20 CFR §

656.21(b)(6), and noted the inconsistency between Employer's representations concerning its recruitment of the worker and the NOF observation that her resume showed experience in the use of a System 1, which indicated that she had the requisite skills in the Apollo System One or in a System 1 similar to Apollo System One. Under these circumstances, the CO said, Employer's test requirement may have been discouraging to the applicant and in view of this evidence the CO directed the Employer to file rebuttal documentation showing that Ms. Hunt was rejected for lawful job related reasons. Mr. Herrera's rebuttal statement described his telephone interview with Ms. Hunt as follows:

> After discussing Ms. Hunt's experience and all aspects of the offered position, we asked her to come in and demonstrate that she was capable of using a computer airline reservation system.

AF 52. The Employer's rebuttal evidence confirmed that Mr. Herrera called Ms. Hunt on October 31, 1995. As the rebuttal also indicated that the Employer's telephone call to Ms. Hunt was only a minute long, the CO found Employer's proof unconvincing for the reasons discussed in the Final Determination. The CO said the evidence failed to support Employer's assumption that Ms. Hunt did not claim work experience in the use of System 1 and a computerized airline reservation system, since she included an explicit reference her work history with such software in her resume.AF 34-35. The CO explained,

> Based upon the employer's statement compared to the record of a one minute telephone call, we cannot find that the documentation is sufficient to show how this applicant truly denied by statement during the telephone conversation that she had any of the computer experience, which she referred to in writing in her response to employer's advertisement. **Gencorp** (87-INA- 659)(Jan. 13, 1988). We also cannot find that the employer has documented convincingly that Ms. Hunt has no experience with any computerized airline reservation system.

AF 35. As the record contained no documentation of her one minute conversation with the Employer that led Ms. Hunt to call back and decline its test on her capacity to use its Apollo or Pass software, the CO said that Mr. Herrera's statement concerning his telephone interview with Ms. Hunt was not sufficient to show that the Employer attempted to recruit her in good faith. The CO reasoned Employer's failure to read and consider her entire resume led it to reject Ms. Hunt for reasons that were unsupported by the evidence of record.[6] For these reasons the CO concluded under 20 CFR § 656.21(b)(6) that the Employer did not sustain its burden of proof in rebutting the NOF finding that it rejected her for reasons that were neither lawful not work-related.

20 CFR § 656.20(c)(8). In addressing the NOF findings as to 20 CFR § 656.20(c)(8), the

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[6]The reference is to AF 140 as part of AF 140-141, to which the CO alluded in discussing Employer's mention of AF 75 in the rebuttal.

CO discussed the structure and background of the Employer corporation and counsel's argument that the "totality of circumstances" test should be applied to the facts it asserted. First, the CO noted that the corporation was formed at about the time the Application was filed, that Mr. Herrera's promotion from "Vice President" to "Chief Executive Officer" in a short time, and that the Alien's brother was the Secretary and the Chief Financial Officer of the corporation, all of which required clarification of the Alien's capacity to influence the management decisions of this small company. The CO reasoned that the company was small and newly created, that the Alien's brother was one of only two officers, that the Alien was offered a managerial position supervising Employer's regular working personnel, that the Employer included an unduly restrictive requirement in its hiring criteria and failed to consider critical qualifications in the resume of the apparently qualified U. S. worker who sought the Job Offered. This evidence, said the CO, did not demonstrate that Mr. Herrera was completely independent of the influence of the Alien's family in hiring and recruiting for this position. After considering the entire record, the CO denied certification.

Appeal. On July 13, 1997, the Employer requested reconsideration and also requested administrative judicial review of the denial of certification. The Employer argued through counsel that its use of a test was "lawful and not dissuasive," that the Job Offered was clearly open to U. S. workers, and that Ms. Hunt was rejected for lawful, job related reasons. In responding to the CO's discussion in the Final Determination, Employer's counsel volunteered new assertions of fact that were not included in the statement by Mr. Herrera or supported by the other evidence of record. AF 02-17. Citing **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*), which holds that motions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal, the CO denied reconsideration and referred this matter to BALCA.

DISCUSSION

Burden of proof. In addressing the issues cited in Employer's appeal, the Panel first observes that certification is a privilege that the Act expressly confers as favored treatment granted to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of this grant of a statutory privilege is indicated in 20 CFR § 656.2(b).[7] Because the Employer applied for alien labor certification

[7] 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants, says, "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

under this exception to the Immigration and Nationality Act on immigration into the United States, the Panel's deliberations concerning the award of alien labor certification concern the grant of an exemption from the general operation of the Act, which must be strictly construed. Consequently, any doubt must be resolved against the party asserting this exemption. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). For the reasons hereinafter discussed, the Employer failed to sustain its burden of proof under the regulations cited in the NOF.

Unduly restrictive job requirements. 20 CFR 656.21(b)(2) disallows the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or not included in the Dictionary of Occupational Titles unless the employer establishes a business necessity for the requirement. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U. S. workers who may apply for or qualify for the job opportunity. **Venture International Associates**, 87 INA 569 (Jan. 13, 1989)(*en banc*).[8] As the Employer's job requirement of ability to use an electronic airline reservation system and other travel service software exceeded the occupation description of the DOT, such requirements were not normal for this occupation. The Employer's chief executive officer said he felt that the ability to use the airline reservation software is a business necessity as it bears a reasonable relationship to the job duties performed by an employee of a travel business. AF 52. The president of a Sherman Oaks travel agency said he regarded skill in the use of electronic airline reservation software as necessary to the performance of the duties associated with travel agency sales
that such ability "is a actually a normal requirement for employment in the travel business and we feel this requirement is essential." AF 60. As Employer's rebuttal addressed only the needs of these two travel agencies, its evidence did not support a finding that such skills are commonly required for managers of travel agencies generally. Consequently, the CO's finding that the evidence of record was insufficient to prove that this skill was a normal requirement for this occupation. Consequently, the Employer was required to establish with convincing evidence that the ability to use an electronic airline reservation system and other travel service software was a business necessity within the meaning of 20 CFR 656.21(b)(2).

Employer's proof. Unless the form of the evidence is specified by the regulations or by the NOF, "written assertions which are reasonably specific and indicate their sources or basis shall be considered documentation." **Gencorp**, 87 INA 659 (Jan. 13, 1988). This Employer's direct proof of the issues cited in the NOF was limited to the statements of Mr. Herrera and the president of the Sherman Oaks travel agency in the rebuttal. Mr. Herrera said only,

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[8] **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), describes the criteria for proof of business necessity. Employer must show: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the restrictive requirement is essential to performing in a reasonable manner the job duties described by the employer. Moreover, the business necessity for a restrictive requirement is not established where the employer fails to provide any supporting documentation. **Coker's Pedigreed Seed Co.**, 88 INA 048(*en banc*); also see **Valley Rest Nursing Homes**, 96 INA 029 (Jun. 5, 1997); **John Hancock Financial Services**, 91 INA 131 (Jun. 14, 1992).

> That I feel the ability to use the airline reservation software is a business necessity as it bears a reasonable relationship to the job duties performed by an employee of a travel business.

While this written assertion constitutes documentation, it clearly is a bare assertion without supporting reasoning or evidence, which is insufficient to carry Employer's burden of proof. **Gencorp**, supra; **Carl Joecks, Inc.**, 90 INA 406(Jan. 16, 1992).[9] The statement by Mr. Herrera was conclusory and vague, and it was not supported by any data, documentation, or other corroborating evidence. The statement by the Sherman Oaks travel agency president also was not supported by data or other corroborating evidence, and it also was conclusory and vague. In addition, however, that stgatement did not give any indication that the Serman Oaks travel agency's business necessity was the same as the business necessity of the Employer. *Supra*. Consequently, this evidence was inadequate to sustain Employer's burden of proof.

The Employer's brief included assertions of fact and conclusions of fact and law by its attorney. The Board has consistently rejected the allegations of counsel as a basis for the employer's assertions. **Re/Max Realty Group**, 95 INA 015 (Jul. 19, 1996); **Sarah and Norman Jaffe**, 94 INA 513 (Oct. 30, 1995); **Wong's Palace Chinese Restaurant**, 94 INA 410 (Oct. 12, 1995).[10] Consequently, in weighing the Appellate File the Panel has rejected the allegations of fact by counsel for the Employer, because they were uncorroborated by other evidence or documentation or the statement of a person with knowledge of the facts. **Moda Linea, Inc.**, 90 INA 025 (Dec. 11, 1991). For the same reasons, the Panel has applied to the statements of fact in counsel's appellate argument the holding in **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*), that a factual theory presented by counsel in a brief cannot serve as evidence of material facts, as the Board has consistently rejected the speculations of counsel as a basis for the assertions of employers.[11]

Analysis and conclusion. For these reasons we conclude that the evidence of record was sufficient to support the CO's finding that the Employer failed to sustain its burden of proof in rebutting the finding that its job requirement of ability to use electronic airline reservation and other travel service software was an unduly restrictive job requirement under 20 CFR 656.21(b)(2). Because the Employer used this unduly restrictive job requirement in the recruitment and rejection of Ms. Hunt, the evidence supported the CO's conclusion under 20 CFR § 656.21(b)(6) that the Employer did not sustain its burden of proof in rejecting this U. S.

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[9] See **Alfa Travel**, 95 INA 163 (Mar. 4, 1997): **Dr. Daryao S. Khatri**, 1994 INA 016 (Mar. 31, 1995); **Jane B. Horn**, 1994 INA 006 (Nov. 30, 1994).

[10] The exception in **Modular Container Systems, Inc.**, 89 INA 228 (July 16, 1991)(*en banc*), that an attorney may be competent to testify about matters of which he has first-hand knowledge, does not apply to counsel's statements of fact in this appeal, since the record contains no evidence of any such first hand knowledge.

[11] See for examples **Re/Max Realty Group**, 95 INA 015 (Jul. 19, 1996); **Sarah and Norman Jaffe**, 94 INA 513 (Oct. 30, 1995); **Wong's Palace Chinese Restaurant**, 94 INA 410 (Oct. 12, 1995).

worker for reasons that were neither lawful nor work-related. Moreover, the Employer's use of this unduly restrictive criterion in rejecting an otherwise qualified U. S. worker further supported the CO's denial of certification under 20 CFR § 656.20(c)(8) because the Employer failed to establish that the Job Offered was clearly open to U. S. workers referred for the position based on the totality of circumstances test.

As the CO's findings on the evidence of record clearly supported the denial of certification, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.